

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	Docket No. CWA-07-2016-0033
)	
NORTH CASCADE ROAD)	
DEVELOPERS, LLC)	
)	
)	COMPLAINT and
)	CONSENT AGREEMENT/
)	FINAL ORDER
Respondent,)	
)	
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22.

2. Complainant, the U.S. Environmental Protection Agency, Region 7 ("EPA") and North Cascade Road Developers, LLC ("Respondent"), have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. This Complaint and Consent Agreement/Final Order serves as notice that EPA has reason to believe that Respondent, North Cascade Road Developers, LLC, has violated Section 301 of the CWA, 33 U.S.C. § 1311, and a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. §§ 1342, and 1342, and regulations promulgated thereunder.

Parties

4. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7 (“Complainant”).

5. Respondent is a corporation incorporated under the laws of the state of Iowa and authorized to conduct business in Iowa.

Statutory and Regulatory Framework

6. The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. Section 101(a) of the CWA, 33 U.S.C. § 1251(a).

7. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342.

8. Section 402 of the CWA provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.

9. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362. Section 502 of the CWA states that “navigable waters” means the waters of the United States.

10. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of storm water. Section 402(p) of the CWA requires, in part, that a discharge of storm water associated with an industrial activity must conform to the requirements of a NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

11. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.

12. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

13. 40 C.F.R. § 122.26(b)(14)(x) defines “storm water discharge associated with industrial activity,” in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five (5) acres of total land area which are not part of a larger common plan of development or sale.

14. The Iowa Department of Natural Resources (“IDNR”) is the state agency with the authority to administer the federal NPDES program in Iowa pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

15. The IDNR issued a Notice of General Permit Coverage under the NPDES General Permit No. 2 to Respondent for the discharge of storm water associated with industrial activity for construction activities, Permit No. IA-14559-14349 (“Permit”). Respondent’s Permit was issued on September 24, 2007, and will remain effective through October 1, 2017.

16. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), authorizes the issuance of a penalty against any person who violates Sections 301 or 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

Factual Background

17. Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

18. At all times relevant to this action, Respondent was the owner, operator and/or Permit holder of the Timber-Hyrst Estates construction site, which is a 106-acre residential development located on North Cascade Road between Creekwood Road to the east and Miners Lane to the west in Dubuque City, Iowa (the Site). Construction activities occurred at the Site beginning in early 2014, and included clearing, grading, and excavation which disturbed five or more acres of total land area or which disturbed less than five acres of total land area that was part of a larger common plan of development or sale.

19. Storm water, snow melt, surface drainage, and runoff water leave the Site and flow through multiple outfall points into the South Forth Catfish Creek. The runoff and drainage from the Site are “storm water” as defined by 40 C.F.R. § 122.26(b)(13).

20. Storm water contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

21. The Site has “storm water discharges associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14)(x), and is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

22. Respondent discharged pollutants into South Fork Catfish Creek. South Fork Catfish Creek and its tributaries are waters of the United States as defined under 40 C.F.R. § 122.2, and South Fork Catfish Creek constitutes “navigable waters” as defined by CWA Section 502(7), 33 U.S.C. § 1362(7).

23. Storm water runoff from the construction Site results in the addition of pollutants from a point source to navigable waters, and thus is the “discharge of a pollutant” as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

24. Respondent’s discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

25. Respondent applied for and was issued NPDES permit coverage under the General Permit described in Paragraph 15 above.

26. Respondent’s Permit states that a storm water pollution prevention plan (“SWPPP”) shall be developed for each construction site covered by the Permit. The purpose of the SWPPP is to ensure the design, implementation, management, and maintenance of Best Management Practices (“BMPs”) in order to reduce the amount of sediment and other pollutants in storm water associated with land disturbance activities.

27. On multiple occasions from May through September of 2014, inspectors from the City of Dubuque, Iowa or the Iowa Department of Agriculture and Land Stewardship (“IDALS”) performed inspections to evaluate Respondent’s management of storm water at the Site.

28. On April 21 and 22, 2015, an EPA representative performed a Construction Storm water Compliance Evaluation Inspection (hereafter “the EPA inspection”) of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate Respondent’s management of storm water at the Site in accordance with its NPDES permit and the CWA. The inspector reviewed Respondent’s records related to its NPDES permit and observed the Site. At the conclusion of the EPA inspection, Respondent was issued a Notice of Potential Violation indicating that the inspection found that the facility had failed to comply with its NPDES permit.

Allegations

29. The facts stated in Paragraphs 17 through 28 above are herein incorporated.

Inadequate Storm Water Pollution Prevention Plan

30. Condition IV.C. of Respondent’s permit requires that the SWPPP be amended whenever it proves ineffective in eliminating or significantly minimizing pollutants.

31. The EPA inspection referenced in Paragraph 28, above, revealed that multiple pollution controls installed pursuant to the SWPPP failed to control sediment runoff caused by storm water.

32. On at least 31 occasions in 2014 and 2015, as referenced below, Respondent failed to conduct and/or document adequate site inspections in accordance with its Permit.

33. Condition IV.D.4.B. of Respondent's permit requires that based on the results of the required site inspections referenced in the preceding paragraph, the description of potential pollutant sources and pollution prevention measures in the SWPPP shall be revised as appropriate as soon as practicable after the inspection, and such modifications shall provide for implementation of any changes to the plan within seven calendar days following the inspection.

34. Respondent failed to adequately evaluate the pollution controls necessary to protect the receiving waters at the Site and to amend the SWPPP to reflect such evaluation.

35. Respondent's failure to adequately develop or amend its SWPPP resulted in Respondent's failure to evaluate, develop, install and/or maintain, among others, the following BMPs:

- a. Multiple sediment basins installed on site were either undersized or improperly engineered;
- b. Multiple controls, including silt fences, were inadequate in controlling sediment runoff caused by storm water.

36. During the April 21 and 22, 2015, inspection, the EPA inspector documented the off-site migration of a significant amount of sediment from the Site. The inspector documented the accumulation of sediment in South Fork Catfish Creek and its tributaries. South Fork Catfish Creek and its tributaries are waters of the United States as defined under 40 C.F.R. § 122.2

37. Respondent's failure to amend its SWPPP is a violation of the Permit, and as such, violates Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and implementing regulations.

Failure to Implement Storm Water Pollution Prevention Plan

38. Condition IV.D.2. of Respondent's permit requires Respondent's SWPPP to include a description of appropriate controls that will be implemented at the construction site, including at a minimum stabilization practices, structural practices, and post-construction storm water management practices.

39. Respondent's SWPPP identifies silt fencing, silt basins, intercepting ditches, sod

flumes, earth dikes, inlet filters and “additional erosion control devices [that] may be required as determined for the project after field investigation”. In addition, it states that contractors are “required to maintain all temporary erosion control measures in proper working order, including cleaning, repairing, or replacing them throughout the contract period,” and that additional erosion control measures shall be placed to lessen the load on existing measures which become overloaded with sediment.

40. Condition VI.M. of Respondent’s permit requires Respondent to at all times properly operate and maintain all facilities and systems of treatment and control which are installed or used to achieve compliance with the conditions of this permit and with the SWPPP.

41. Condition IV. of Respondent’s permit requires facilities to implement the provisions of the SWPPP required under Part IV as a condition of the permit.

42. Inspections performed by the City of Dubuque or IDALS in May through September of 2014 documented multiple areas of the Site that lacked adequate erosion controls.

43. The EPA inspection performed in April of 2015 documented that multiple areas of the Site lacked adequate erosion controls.

44. The documented failures to install or maintain adequate erosion controls at the Site constitute failures to implement the Site’s SWPPP

45. Respondent’s failure to implement the Site’s SWPPP is a violation of its NPDES permit, and as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

Failure to Conduct and Document Site Inspections

46. Condition IV.D.4. of Respondent’s permit requires qualified personnel (provided by the discharger) to inspect disturbed areas of the construction site that have not been stabilized with a perennial, vegetative cover of sufficient density to preclude erosion at least once every seven calendar days. Condition IV.D.4.B. of Respondent’s permit requires that, based on the results of the inspection, the description of potential pollutant sources and pollution prevention measures shall be revised as appropriate as soon as practicable after the inspection, and such modifications shall provide for implementation of any changes to the plan within seven calendar days following the inspection.

47. Condition IV. of Respondent’s permit requires facilities to implement the provisions of the SWPPP required under Part IV as a condition of the permit.

48. Respondent’s SWPPP states that inspections shall be conducted at least once every seven calendar days and recorded in the project diary. It specifies that corrective action

shall be taken immediately upon finding of deficiencies, and that all corrective actions shall be completed within three calendar days of the inspection.

49. The EPA inspection referenced in Paragraph 28, above, revealed that, on at least 31 occasions in 2014 and 2015 Respondent failed to conduct and/or document inspections in accordance with the terms of its SWPP.

50. Respondent's failures to conduct and/or document Site inspections are failures to implement the SWPPP and violations of Respondent's NPDES permit, and as such, violate Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and implementing regulations.

51. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is proposed that a civil penalty be assessed against Respondent for the violations of the CWA identified above, the amount of which is set forth in Paragraph 60 below.

CONSENT AGREEMENT

52. Respondent and EPA agree to the terms of this Consent Agreement/Final Order.

53. Respondent admits the jurisdictional allegations set forth in this Complaint and Consent Agreement/Final Order and agrees not to contest EPA's jurisdiction in this proceeding or in any subsequent proceeding to enforce the terms of this Consent Agreement/Final Order.

54. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Complaint and Consent Agreement/Final Order.

55. Respondent waives any right to contest any issue of fact or law set forth above, and their right to appeal this Consent Agreement and the accompanying proposed Final Order.

56. Respondent and Complainant agree to resolve the matters set forth in this Consent Agreement/Final Order without the necessity of a formal hearing and agree to bear their own costs and attorney's fees.

57. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to it.

58. Respondent understands and agrees that this Consent Agreement/Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement/Final Order.

59. Respondent certifies by signing this Consent Agreement/Final Order that, to the best of its knowledge, Respondent is in compliance with all requirements of Sections 301 and 402 of CWA, 33 U.S.C. §§ 1311 and 1342.

Penalty Payment

60. Respondent agrees that, in settlement of the claims alleged in this Complaint and Consent Agreement/Final Order, Respondent shall pay a civil penalty of Fifty Thousand Dollars (\$50,000.00) within thirty calendar days of the effective date of this Final Order. Such payment shall identify Respondent by name and docket number and made as follows:

If by cashier's or certified check, payment should be made payable to "Treasurer, United States of America," and sent to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000.

If by wire transfer, payment should be directed to the Federal Reserve Bank of New York as follows:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency"

If by electronic payment, payment may be submitted on-line at www.pay.gov by entering "SFO 1.1" in the "Search Public Forms" field. Open the on-line form and complete the required fields to complete payment. Respondent shall print a copy of the payment receipt and mail a copy of the receipt to the contacts listed below.

61. Copies of the transmittal letter and the check, or other information confirming payment, shall be simultaneously sent to:

Regional Hearing Clerk

U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and to:

Delia Garcia
WENF/WWPD
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

62. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

63. Interest on any late payment will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs and interest thereon.

Effect of Settlement and Reservation of Rights

64. Respondent's payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for violations alleged in this Complaint and Consent Agreement/Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

65. The effect of settlement described above is conditional upon the accuracy of Respondent's representations to EPA, as memorialized in Paragraph 59 of this Consent Agreement/Final Order.

66. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.

67. Notwithstanding any other provision of this Consent Agreement/Final Order, the EPA reserves the right to enforce the terms of this Consent Agreement/Final Order by initiating a

judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

68. With respect to matters not addressed in this Consent Agreement/Final Order, EPA reserves the right to take any enforcement action pursuant to the CWA and its implementing regulations, or any other available legal authority, including without limitation the right to seek injunctive relief, monetary penalties, and damages.

General Provisions

69. The Parties acknowledge that this Consent Agreement/Final Order is subject to the public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45.

70. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after entry by the appropriate regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

71. The State of Iowa has been provided an opportunity to consult with Complainant regarding this matter in accordance with the requirements of 40 C.F.R. § 22.38(b) and Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

72. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

73. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed in part and counterpart.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division

Date

Chris Dudding
Office of Regional Counsel

Date

RESPONDENT:
NORTH CASCADE ROAD DEVELOPERS, LLC

Martin J. McNamer

Name (print)



Signature

09/29/2016

Date

Managing Member

Title

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date